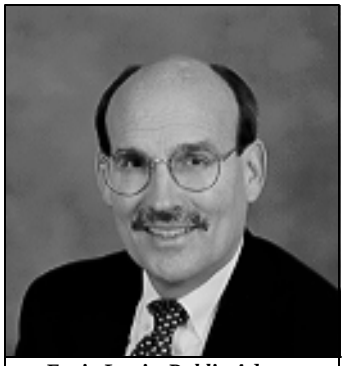
LEGISLATIVE UPDATE

COVERING CRIMINAL JUSTICE LEGISLATIVE ISSUES

FEBRUARY 2002, NO. 13 **DEPARTMENT OF PUBLIC ADVOCACY**

RECESSION AFFECTS PUBLIC ADVOCACY BUDGET



Ernie Lewis, Public Advocate

The Department of Public Advocacy (DPA) has experienced significant progress over the past 5 years, detailed in past issues of the *Legislative Update*. DPA has experienced growth toward a full-time public defender system at the trial level, salaries have been increased for entry level and experienced defenders, and there has been some progress in reducing caseloads.

DPA BUDGET REDUCED IN FY01 & FY02

This progress has been affected by the recession of 2001 and by the events of September 11. In FY01, DPA had its budget of $25.8 million reduced by $466,000. In FY 02, by the end of December, DPA had its budget of $28.7 reduced by 3%. DPA's total budget today is $28.1 million. DPA, like the rest of state government, is now attempting to reduce its expenditures without effecting service delivery.

Upon recommendation of the Governor, the 2000 General Assembly funded DPA for a number of projects to implement the 12 recommendations of *The Blue Ribbon Group* (BRG), which issued its report in June 1999. Some of the projects, such as extending the full-time system into 23 additional counties near an existing full-time office, and increasing defender salaries, were implemented in FY01 and early in FY02. Some of the projects, however, were to come on line toward the end of the current fiscal year. These included the opening of two new offices in Murray and Bullitt County, and reducing caseloads by placing 10 caseload reduction lawyers into the offices with the highest caseloads.

The 3% budget reduction has caused DPA to reassess those items funded for the latter part of FY02, resulting in a scaling back of the projects. First, the Murray Office, which opened early in August of 2000 in order to deal with a crisis in the delivery of defender services in Western Kentucky, will have 6 attorneys rather than the originally funded 9 attorneys. As a result, Fulton and Hickman Counties will likely not be covered by a full-time office for the time being, although revenue is being sought to enable these two counties to be covered by the Paducah Office. Second, the Bullitt Office will be delayed until August of 2002, and will open with 2 lawyers rather than the originally funded 4 lawyers. The office will cover only Bullitt and Spencer Counties, rather than Bullitt, Nelson, and Spencer Counties. (Nelson County will continue to be covered by the Elizabethtown Office, one of the several DPA offices experiencing high caseloads). The Bullitt Office will not have its own investigator, but will rely upon the investigator in the Elizabethtown Office. Finally, only 5 caseload reduction lawyers rather than 10 will be placed in the highest caseload offices. High caseloads will remain a problem this year and in the next biennium.

By the end of FY02, DPA will have made great progress toward its goal of completing the full-time system at the trial level by July 2004. In 1996, only 47 counties were covered by a full-time office. Today, 105 counties are covered by a full-time office. An additional three will be covered by the end of this fiscal year. Only 12 counties will remain covered by a private lawyer on contract with the state by the close of this fiscal year.

BLUE RIBBON GROUP CALLS FOR COMPLETION OF FULL-TIME SYSTEM

The Blue Ribbon Group met again on September 26, 2001, and surveyed the progress in the Kentucky public defender system since its report of June 1999. *The Blue Ribbon Group* commended "the Governor and the General Assembly for their courageous and insightful significant first step toward adequate funding for indigent defense in the 2000 General Assembly. The first phase allowed for an increase in salaries,

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greater retention of attorneys, some reduction in caseloads, and progress in creating a full-time system."

The Blue Ribbon Group recognized that the recession and the events of September 11 had caused unique problems for the DPA. "In light of the historical impact of economic decline, higher caseloads can be expected in the immediate future." In response, *The Blue Ribbon Group* called upon DPA's funding authorities to complete the second phase of the BRG plan, which included "completion of a full funded full-time public defender system throughout the state…the BRG urges immediate action to fully fund the Public Advocacy system in order to achieve this constitutionally mandated basic service for the people of the Commonwealth of Kentucky."

GOVERNOR PATTON'S FY 03&04 BUDGET

Governor Patton announced on January 22, 2002, a budget for the Department of Public Advocacy that is responsive both to the economic problems of the Commonwealth and to the call by *The Blue Ribbon Group* to complete the full-time system.

First, the FY03 budget for DPA will remain flat. The 3% reduced budget of FY02 will become the budget for FY03. DPA will have to implement numerous efficiencies in order to continue to supply services. DPA has no control over its caseload. Rather, the legal services it supplies are mandated by the Kentucky and United States Constitutions. Caseload went up by 3% in FY01. During the first six months of FY02, caseload has gone up another 3%. This caseload increase in the face of a 3% budget reduction for FY03 will require significant belt-tightening throughout the DPA. This includes 3% reductions in both the Jefferson and Fayette County systems. Vacant positions will not be able to be filled as quickly as they have in the past. Numerous other efficiencies will need to be undertaken.

There is one item added to the Governor's budget for FY03 beyond the flat-lined FY02 budget reduced by 3%. $60,000 is being included to supply an additional attorney to cover the new judgeship in the 57th Judicial Circuit, Russell/Wayne Counties, which is covered by the Somerset Office.

The FY04 budget starts with the same flat-lined budget of FY03. However, the Governor includes two significant projects for FY04. The Governor's budget authorizes the opening of two new offices. An office in Boone County will cover Boone, Gallatin, Owen, Carroll, and Grant Counties. An office in Cynthiana will cover Harrison, Robertson, Pendleton, Nicholas, and Bourbon Counties. In addition, approximately $667,000 will be added back in to cover continuation of existing services.

The addition of two new offices into the Governor's budget request is an important development. *The Blue Ribbon Group* recommended the completion of the full-time system. The 2000 General Assembly took important strides toward completing the goal. The goal of the completion of the full-time system by the end of FY04 will be within reach. Only three counties, Campbell, Barren, and Metcalfe, will remain covered by a part-time contract system. Campbell will one day be covered by the Covington Office. Only 2 new offices, Glasgow and Greenup (to cover counties presently covered by the Morehead and Maysville Offices) will remain to be opened.

This progress at a time of recession and uncertainty is a tribute to the vision of *The Blue Ribbon Group* and Governor Patton, and the strong support of the General Assembly. The $11.7 million additional General Fund dollars originally envisioned by *The Blue Ribbon Group* in 1999 will not yet have been realized by the end of FY04. According to *The Blue Ribbon Group*, this amount was needed to avoid the following significant risks:

- "turnover of staff,"
- "public defender caseloads will increase to the breaking point,"
- "DPA will not be able to provide representation to all indigent defendants,"
- "cases will have to be retried because of the inadequacy of counsel,"
- and the risk "that the Commonwealth of Kentucky could not adequately defend a statewide systemic lawsuit due to the inadequate resources and overwhelming caseload."

High defender caseloads, an inadequate system of capital defense at the trial level, the need for additional appellate staff, access to courts for inmates and juveniles, and infrastructure—all remain as needs in order to fully complete the recommendations of *The Blue Ribbon Group*. However, the Department of Public Advocacy will continue to make significant progress toward meeting its mission of serving clients, the courts, and the public if this budget is funded. ■

Learn from yesterday, live for today, hope for tomorrow.

-Anonymous

DNA LEGISLATION BEING PROPOSED

As the General Assembly began, it was clear that DNA legislation was going to be one of the predominant issues being considered.

There are many bills being considered. Rep. Yonts has filed HB 4 expanding the DNA database. Rep. Riggs filed HB 53 to accomplish an expanded database in a different way. Rep. Buckingham has also proposed HB 132 to expand the database. Rep. Webb and Rep. Crenshaw filed HB 424 to address post-conviction testing for death row inmates. Sen. Neal filed SB 67 to specify how evidence must be preserved, and to prevent destruction of DNA evidence without the holding of a hearing. SB 98 has been filed by Sen. Borders and Sen. Seum in order to expand the database.

At the time of this writing, three meetings of the House Judiciary Committee considered a variety of DNA bills. A Committee Substitute for HB 4 which brought together many of the ideas represented by the wide variety of the bills was reported favorally January 31, 2002.

Through this, DPA's position has been consistent with testimony presented by the Public Advocate Ernie Lewis at the November Interim Judiciary Committee Meeting. DPA's position on DNA is as follows:

DNA IS IMPORTANT

DNA is important to ensure guilty people are prosecuted and punished. DNA is also vital to ensure that the innocent are not punished for crimes they did not commit. DNA is an including and excluding technology.

The FBI has found that since 1979, DNA testing has cleared 25% of sexual assault suspects whose samples were sent to the FBI.

John Silbar reported in the July 2001 *Boston Herald* that 87 prisoners have been exonerated through DNA testing. These 87 included William Gregory, a Louisville man wrongly convicted of rape, and freed after DNA testing after serving 8 years in prison.

The Kentucky Criminal Justice Counsel Interim Report (July 2001) recommended legislation to adequately fund and support the collection, testing and preservation of DNA to ensure its availability to prosecution and defense in a timely manner in capital cases. It is further recommended that legislation comply with federal guidelines for incentive funding.

There is broadly based public support for making DNA testing available to inmates. The 2000 Gallup Poll shows 92% of Americans support DNA testing for inmates convicted prior to availability of the test. The 2001 Peter D. Hart Associates Poll showed 91% favor requiring courts to give death row inmates the opportunity to prove their innocence with DNA tests.

After a year of study, a distinguished bipartisan blue ribbon committee of *The Constitution Project* recently issued a report on reforming capital punishment, including 18 reforms. *The Constitution Project's* 30-member death penalty initiative group has members that are supporters and opponents of the death penalty, Republicans and Democrats, conservatives and liberals. Entitled *Mandatory Justice: Eighteen Reforms to the Death Penalty* (2001) the Report made the following recommendation for DNA:

> Reform #6: "DNA evidence should be preserved and it should be tested and introduced in cases where it may help to establish that an execution would be unjust.
>
> All jurisdictions that impose capital punishment should ensure adequate mechanisms for introducing newly discovered evidence that would more likely than not produce a different outcome at trial or that would undermine confidence that the sentence is reliable, even though the defense would otherwise be prevented from introducing the evidence because of procedural barriers.

Co-Chairs of this 30-member group were: **Charles F. Baird** *former Judge, Texas Court of Criminal Appeals,* **Gerald Kogan**, *former Chief Justice, Supreme Court of the State of Florida; former Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida,* **Beth A. Wilkinson,** *Prosecutor, Oklahoma City bombing case.* **William Sessions**, FBI Director in the Reagan and Bush administrations, was a member.

DPA's Interests

The Department of Public Advocacy has an interest in DNA legislation. DPA attorneys represent everyone on Kentucky's death row and 90% of felons at trial level. DPA has a Post-Conviction branch charged with the representation of post-conviction inmates. The DPA *Kentucky Innocence Project* at UK, Chase, UK School of Social Work has reviewed 141 cases. Of these, 32 involve evidence that could be subject to DNA testing of evidence.

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Areas of Concern

1. DNA testing should be available to persons who make a showing to a court that: A reasonable probability exists that the inmate would not have been prosecuted or convicted if the exculpatory evidence had been obtained through DNA testing. If the evidence would be relevant to the correctness of the sentence, or if it would be helpful to establishing an erroneous conviction, testing should be available. Evidence to be tested is still in existence. Evidence was not previously tested, or if it was, new testing is now available. State should provide counsel for persons who make this showing.

2. Biological material needs to be saved while the person is incarcerated. If the Commonwealth seeks to destroy the crime scene biological evidence, it should only be accomplished after notice and an opportunity to petition the court for testing. This is consistent with the *National Commission on the Future of DNA Evidence* and the proposed *Innocence Protection Act* now pending in Congress.

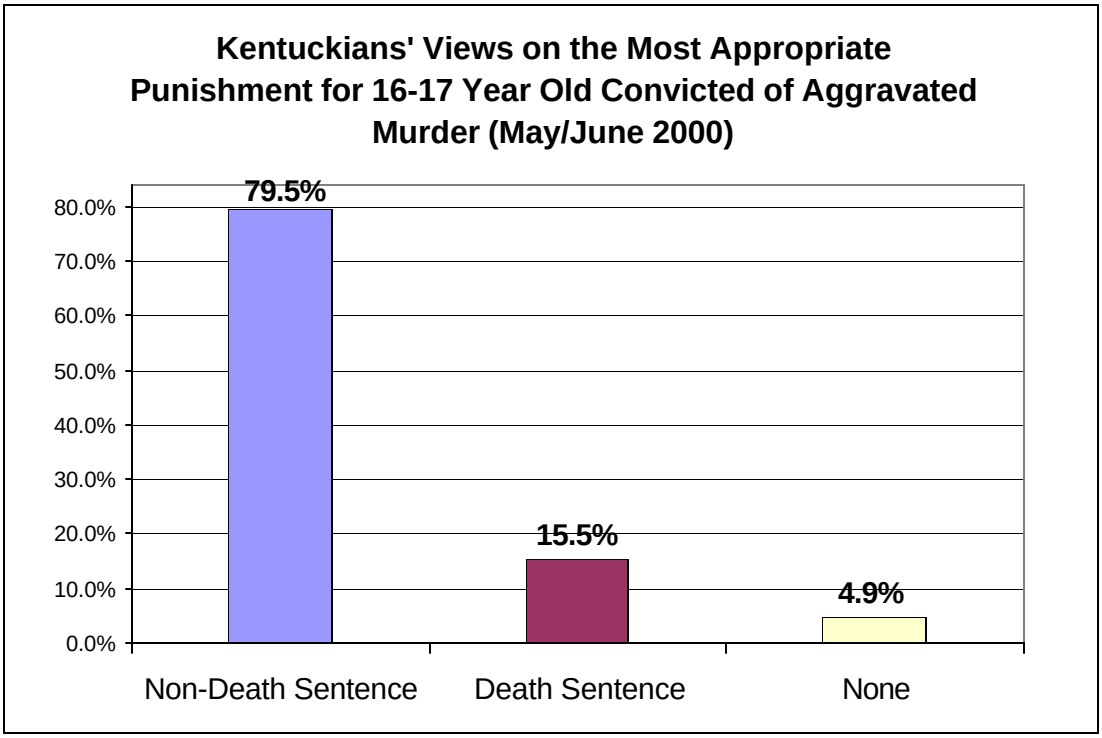
3. DNA/Biological evidence needs to be kept despite a confession or a plea of guilty because we have persons with mental retardation who confess to crimes they did not commit.

4. Biological evidence itself rather than results should be stored to accommodate new technology.

5. Procedural limitations should be relaxed where the results show an innocent man is in prison. Presently, there is a 3 year standard under RCr 11.42 and a 1 year under RCr 10.06 or more "if the court for good cause permits." This should be relaxed to allow for the release of an innocent man at any time the evidence is produced. This approach is supported by the *National Commission on The Future of DNA Evidence*, a federal panel established by law enforcement, judicial, and scientific experts.

6. Kentucky needs to be ready. Federal Byrne Grant funds, Local Law Enforcement Assistance Program funds, DNA Analysis Backlog Elimination Grants, Paul Coverdell National Forensic Sciences Improvement Grants, DNA Identification Grants, Drug Control and System Improvement Grants, Public Safety and Community Policing Grants will be available under the Innocence Project Act of 2001(H.R. 912/S. 486). That bill has 215 co-sponsors in the House and 24 in the Senate.

   The national legislation conditions receipt of funding on adequate procedures for preserving biological materials, and testing must be available to inmates. DNA testing must be made available to death row inmates if the testing has the scientific potential to produce new exculpatory evidence to a claim of innocence. *The National Institute of Justice* has a Uniform Statute for obtaining post-conviction testing. See NIJ's Postconviction DNA Testing: Recommendations for Handling Requests (September 1999). ■



Children's Bill Considered by Legislature: Should 16 and 17 Year Olds Be Executed?

Ed Monahan
Deputy Public Advocate

Kentucky law now allows the death penalty for children 16 and 17 years of age who are convicted of a capital crime. KRS 640.040. The 2002 General Assembly is considering whether juveniles who are 16 or 17 should continue to be eligible for a sentence of death. House Bill 447 sponsored by Representative Robin Webb of Grayson with 16 bipartisan cosponsors including Representative Tim Feely, a former Assistant United States Attorney from Crestwood, and Senate Bill 127 sponsored by Senator Gerald Neal of Louisville with 6 cosponsors would eliminate death as a possible penalty for a 16 or 17 year old who commits an aggravated murder.

Judgment is undeveloped into late adolescence. A Commission of the National Academy of Science reviewed the scientific evidence and reported in 2001 that "adolescents are not just little adults. Physical, emotional, and cognitive development continue throughout adolescence." Recent medical research shows that the areas of the brain that regulate emotions, self-control, and judgment are still developing through the early 20's. The prefrontal cortex, the area adults use to exercise emotional control, undergoes significant change in late adolescence. Brain imaging shows this area is very active in adults making certain social judgments, but barely involved in similar teen judgments. Because their brains are not fully mature, teens do not handle social pressure, instinctual urges, and other stresses the way adults do. They are more prone to immature, reckless and dangerous behavior.

Kentucky's policy is children cannot be trusted below 18 to make wise judgments:

- 18 is the age of majority in Kentucky. KRS 2.015.
- 21 is the age to buy and possess alcohol. KRS 244.080, .085, 087, .090.
- Children are not allowed to contract until they are 18. KRS 371.010(2).
- Children must be 18 before they are allowed to buy cigarettes. KRS 438.300.
- Persons under 18 are not permitted a driver's license if they have not graduated from high school or are not enrolled in school.
- Children must be 18 before donating their bodily organs. KRS 311.175.
- Children must be 18 generally (unless they are parents) before allowed to make a will. KRS 394.020-030.
- Children must be 18 (unless there is parental or judicial consent) to marry. KRS 402.020.

Abolishing the death penalty for 16 and 17 year olds is consistent with Kentucky's policy judgment on children.

Juries Can Imprison Juveniles for the Rest of their Lives. Under the proposed legislation, juveniles who commit serious crimes are held accountable in significant ways. First, a juvenile is subject to life imprisonment and life imprisonment without the possibility of being considered for parole for 25 years for capital offenses. While a person who receives a life sentence is eligible for parole after 20 years, the reality is that the Kentucky Parole Board seldom paroles persons who receive life sentences. The facts are that the majority of persons are not paroled the first time they are eligible for parole.

Second, a juvenile can be sentenced to a lengthy term of years that carries with it an extensive time prior to being eligible for parole. The 1998 Kentucky General Assembly created a provision of 85% parole eligibility for a term of years for violent offenders under KRS 439.3401(3). A violent offender is defined to include juveniles convicted of a capital offense. Juveniles can be sentenced up to 50 years per Class A crime. In a capital case that means such a sentence for the murder and also for the aggravating factor set out in KRS 532.025(2)(a) if it is a violent crime. These sentences can be added together in a consecutive fashion to total 70 years under KRS 532.110(1)(c).

Under the 85% parole eligibility provision, a juvenile who receives a sentence for a murder and another violent crime that totals 70 years is not eligible to be considered for parole for 59.5 years. That is equivalent to a life sentence with no parole - 59.5 years plus the juvenile's age of 16 or 17 would make the individual first eligible for parole at 75.5 years of age.

The likelihood of the release of individuals who committed crimes as juveniles who remain dangerous is very small. The Kentucky criminal justice system has some good procedures in place already to insure against the inappropriate release of a dangerous juvenile. They are working effectively.

8 out of 10 Kentuckians do not support death for 16 and 17 year olds. An overwhelming number of Kentuckians believe that juveniles should not be executed. Recently, 79.5% of those polled in the state who gave an answer said that the most appropriate punishment for a juvenile convicted of an aggravated murder in Kentucky was a sentence other than death. There are 15.5% of Kentuckians who believe that death is the most appropriate penalty for a juvenile who is convicted of an aggravated murder. There were 4.9% who responded they didn't know. *The Spring 2000 Kentucky Survey* which surveyed 1,070 noninstitutionalized Kentuckians 18 years of age or older from May 18 – June 26, 2000 and was conducted by the University of Kentucky Survey Research

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Center, asked the following question and had the following answers:

If a 16 or 17 year-old is convicted of aggravated murder, which of the following punishments do you personally think is MOST appropriate:

The death penalty…….15.5
Life in prison without the possibility of parole forever 23.1
Life in prison without the possibility of parole for 25 years 17.8
Life in prison without the possibility of parole for 20 years, or 15.3
20 to 50 years in prison without the possibility of parole until at least 85% of the sentence is served 23.3
None of the above (volunteered) 4.9

The margin of error of the poll is approximately ± 3% at the 95 % confidence level. Households were selected using random-digit dialing, a procedure giving every residential telephone line in Kentucky an equal probability of being called.

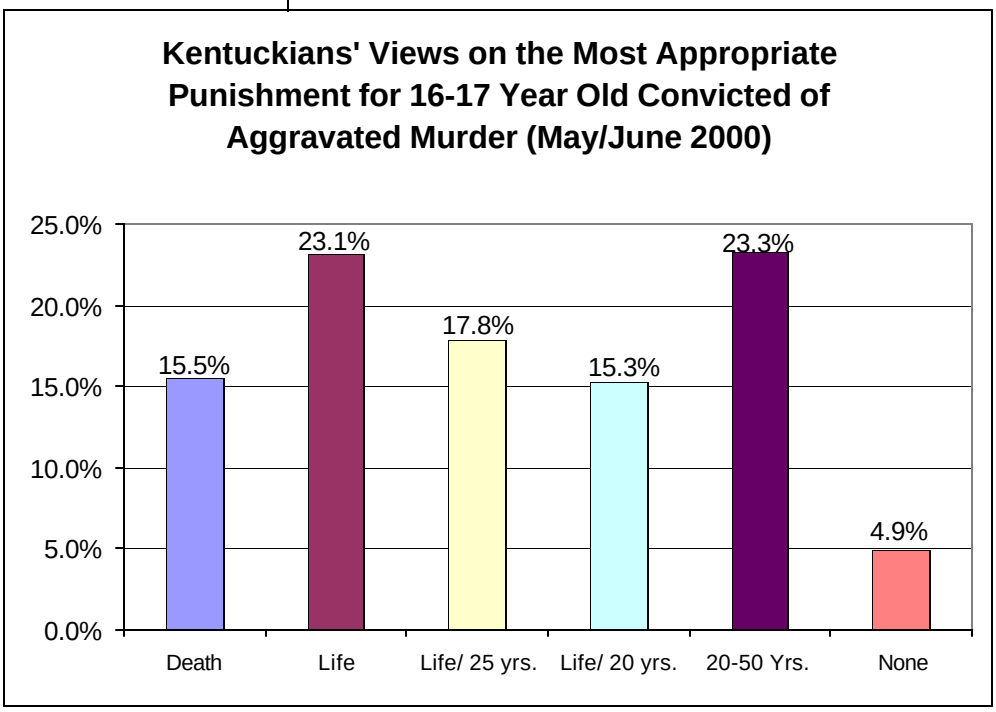
National bipartisan groups call for the elimination of the death penalty for children. There is emerging national agreement that the death penalty should be eliminated for children. A 1988 Criminal Justice Section Report of the American Bar Association (ABA) stated, "The spectacle of our society seeking legal vengeance through execution of a child should not be countenanced by the ABA." The ABA approved the following resolution: "That the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committed while under the age of 18." The 1997 ABA Call for a Moratorium was based in part on the fact that states continue to sentence children to death.

After a year of study, a distinguished bipartisan blue ribbon committee of The Constitution Project called for 18 reforms in the death penalty. Entitled *Mandatory Justice: Eighteen Reforms to the Death Penalty* (2001), the report details recommendations that relate to various aspects of capital punishment. Among other things, the reforms call for elimination of the death penalty for those under 18. The Constitution Project's 30-member death penalty initiative group has members that are supporters and opponents of the death penalty, Republicans and Democrats, conservatives and liberals.

The United States is isolated in the world. There is nearly universal international agreement that the death penalty should be eliminated for those under 18. China and Iran have now abolished death for those under 18. Since 1991, only 7 countries have executed juveniles. The number of the 25 executed worldwide since 1991 are: the United States (13), Iran (6), Pakistan (2), Nigeria (1), Saudi Arabia (1), Congo (1), and Yemen (1). United Nations' treaties prohibit the death penalty for those under 18.

Less than Half the States have the death penalty for juveniles. 38 states and the federal government have the death penalty. Of those 39 jurisdictions with the death penalty, 16 have 18 as the minimum age for the death penalty. In 5 states, 17 year olds are eligible for death. In 18 states, 16 year olds are eligible for the death penalty. When the 12 states that forbid the death penalty totally are combined with the 16 that prohibit it for those under 18, 56% of the states have decided death is not appropriate for children.

Prosecutors. The Kentucky Commonwealth Attorneys Association has not taken a position on the bill to eliminate the death penalty for juveniles. Some prosecutors favor the elimination of the death penalty for juveniles. Franklin County Commonwealth Attorney Larry Cleveland said in a July 15, 2001 *State Journal* interview that he did not favor the death penalty for juveniles. "That's a different situation. You feel there is always some hope of a juvenile turning his life around and being a productive member of society….I can't see myself ever being supportive of executing a juvenile or mentally defective person." Former Franklin County Commonwealth Attorney Morris Burton also indicated in that article that he was not in favor of executing juveniles.■



Juvenile Death Penalty and Adolescent Development

Mark S. Wright, M.D., President of KY Psychiatric Association

In general, the medical and scientific communities have not gotten involved professionally in the debate over the death penalty. But due to new scientific discoveries on adolescent development, the medical professions can no longer remain neutral on the death penalty.

New research shows that juveniles are far less developed than we ever knew (at least as scientists, although perhaps not as parents). The studies have prompted many in the medical, psychological and scientific communities to seek the end of the death penalty for those under the age of 18. Offenders under the age of 18 are less mature than their adult counterparts. Longstanding traditions of American law base the degree of punishment on the degree of fully formed intent making it immoral to execute teenagers who murder.

As it is, the United States is one of the very few (3 or 4) remaining countries in the world that still execute juvenile offenders.

Those in favor of the death penalty for juveniles argue that 16 and 17 year olds are capable of understanding right from wrong and conforming their actions to the requirements of the law. They also argue that it doesn't matter to the victim how old the offender is and that if one commits an "adult crime," he or she should be subject to adult penalties, including death. They argue that it should be left to juries to determine whether individuals under 18 should be subjected to death.

But those arguments aren't likely to sway the medical community in light of the discoveries on juvenile development. As reported in a Harvard Medical School publication, researchers are now challenging the commonly held tenet that the brain finishes development at puberty. It now appears that the adolescent brain is far less finished, and far more dynamic, than previously believed.

Not only do adolescents exhibit growth spurts in physical appearance, but so do their brains undergo "dramatic changes" beyond puberty, the publication reported. The parts of the brain still developing are, among others, the frontal cortex and the prefrontal cortex. These are the "executive" areas of the brain which, among other things, calm emotions, control impulses, make decisions, process abstract ideas and organize and plan multiple tasks.

According to Jay Giedd of the National Institute of Mental Health, this brain "maturation continues into the teen years and even the 20s." Recent research by Dr. Bruce Perry of the Baylor College of Medicine has also found that child abuse and neglect have profound, permanent and harmful effects on brain development. Not surprisingly, nearly all of the juvenile offenders on our nation's death rows experienced serious abuse and neglect or suffer from mental retardation.

Scientific proof that even normal adolescents are in far less control of their thoughts, impulses and actions, convinces us that they should not be held to the same standard of punishment as fully developed adults. Indeed, how can anyone now (as opposed to 1971) decide that a sexually assaulted, abused, neglected, borderline retarded, impaired teenager should be held to the same standard of punishment as 33 year old Oklahoma City bomber Timothy McVeigh?

The American Society for Adolescent Psychiatry, the American Academy of Child and Adolescent Psychiatry and the 40,000 member American Psychiatric Association have all adopted policies specifically opposing capital punishment for those under 18. In supporting ratification by the U.S. of the United Nations Convention on the Rights of the Child which, among other things, bans the execution of offenders under 18, even the American Medical Association and the American Psychological Association have essentially taken the same position.

Scientific advances have led most states to stop using the electric chair or gas chamber as a means of execution. Similarly, new understandings of the limitations of the mentally retarded in how they think, plan, act, and react have caused many states, including Kentucky, to revisit their policy of executing the retarded. It is time for the law to adapt to what science has discovered with regard to youthful offenders.

A recent statewide poll shows eight out of 10 Kentuckians favor a sentence other than death for a 16 or 17 year old who commits an aggravated murder.

In its upcoming session, the Kentucky Legislature is expected to take up the issue of juvenile executions. Let's hope our lawmakers can make all Kentuckians proud, as it so often has, and eliminate capital punishment for those offenders under 18. ■

Indiana Panel OKs Raising Execution Age

The *Indianapolis Star* reports that the Indiana Senate Judiciary Committee approved a measure on January 30, 2002 that would raise the minimum age for the death penalty from 16 to 18. The bill sponsored by Sen. Anita Bowser, D-Michigan City, now goes to the full Senate. Indiana is one of 18 states that allow the execution of 16-year-olds.

Legislative Update
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